FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER,
Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC.
and FRANCIS W. SHEDD, Individually and on Behalf of
All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF ON BEHALF OF APPELLANTS

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November, 1976.

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STATUTES.

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Appellees.

Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

REPLY BRIEF ON BEHALF OF APPELLANTS

The District Court and the appellees premise their analysis of the issues, and base their conclusions, on the erroneous *assumption* that irrespective of the nature or purpose of a state-sponsored elective process, the one-person, one-vote principle is a constitutional mandate. The District Court articulated its holding in the following language:

"The State of New York, having chosen to create subordinate units of government, is not immune from judicial scrutiny when confronted with a claim that its exercise of sovereign power results in the imposition of unconstitutional conditions upon the voters of that political subdivision" (A. 141).

The appellees recite the assumed conclusion as follows:

"The federal government is not forcing its will on the State of New York by the District Court's decision but only saying that if you hold an election, each citizen equally affected has an equal vote" (Page 16, brief of appellees Graf and Comferford)[1].

"There is no valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election" (Page 11, brief of appellees CALL and Shedd).

[1] The current position of the appellees, Graf and Comerford, and the exceptional failure of the Attorney General of the State of New York to file a brief on this appeal and to participate in argument (despite the requirements of Sections 63 and 71 of the Executive Law of New York; Volume 18, McKinney's Consolidated Laws of New York), raise serious questions as to whether the District Court gave consideration to an actual case or controversy, benefited by the development of facts and the exposition of applicable legal principles normally resulting from the adversary system. In their answer to the complaint (A. 36), appellees Graf and Comerford admitted the substantive allegations claiming unconstitutionality, but raised the affirmative defense of *res judicata* by reason of the District Court's previous decision in *County of Niagara v. State of New York* (A. 178-82). Those appellees requested "the court to dismiss the action of the plaintiff on the grounds that no substantial federal question exists" (A. 36). Before this Court, those appellees take a contrary position. In the Court below, the State Attorney General urged dismissal of the complaint, but failed to appeal the adverse judgment and failed to participate in this appeal. No proof was offered by any of the defendant-appellees with respect to the governmental reasons for the state's constitutional and statutory provisions governing the method of effecting changes in existing forms of county government; the District Court granted summary judgment on the basis of extraordinarily spare cross-motion papers.

This Court has, however, carefully avoided any such extreme position or result, declining to impose the one-person, one-vote principle as a constitutional mandate with respect to a variety of elective or referendum processes: *Wells v. Edwards*, 347 F. Supp. 453, aff'd. 409 U.S. 1095 (1973); *Fortson v. Morris*, 385 U.S. 231 (1966); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); *Sailors v. Board of Education*, 387 U.S. 105 (1967). That the one-person, one-vote principle does not have universal, mechanical application to all elective or referendum processes is further emphasized by this Court's recent refusal to grant certiorari in *Ripon Society v. National Republican Party*, 525 F.2d 567 (1975), cert. den. February 23, 1976, 96 Sup. Ct. 1147, 1148.

The decision of the Court of Appeals in *Ripon* appropriately recognizes this Court's growing sensitivity to the necessity of avoiding a simplistic, mechanical approach, and to require instead careful analysis to determine if the proposed extension of the principle is compatible with its rationale and is required in a balancing of competing constitutional precepts.

In *Ripon*, the Court of Appeals upheld the delegate allocation formula adopted for the purpose of determining representatives to the Republican national nominating convention, and in so doing commented on the exceptions to the one-person, one-vote requirement as follows:

"They do demonstrate, however, that the principle of one person, one vote is not an absolute, to be unthinkingly invoked every time two or more persons are selected to make decisions on other people's behalf, even if the making of those decisions is very plainly 'state action.'

> The constitutional command is not one person, one vote but equal protection of the laws, and what it requires by way of representation in a given assembly must depend on the purposes for which the assembly is convened and the nature of the decisions it makes."

The *Ripon* decision involved a balancing of the rights of the major political parties under the First Amendment to choose the manner in which delegate strength would be allocated among the states, and the Fourteenth Amendment Equal Protection Clause guarantees. The Court of Appeals there stated:

> "What is important for our purposes is that a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation" (595 F.2d at 585).

That statement of the Court of Appeals can be modestly paraphrased for application to the case at bar as follows:

> What is important for our purposes is that a State's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the State and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation.

The starting point here must be the conceded proposition that the state has the sovereign and exclusive right to determine and to develop its own internal governmental apparatus and instrumentalities. As appellees acknowledge: "New York State, with a proper procedure, could abolish all referenda for adoptions [sic] of charters in political subdivisions" (Page 15, brief of appellees Graf and Comerford).

As this court said in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960): "When a state exercises power wholly within the

domain of state interests, it is insulated from federal judicial review."[2] As long as the exercise of that conceded power does not do violence to some other constitutionally protected right, the federal judiciary should not impose its judgment as to the advisability or wisdom of policy decisions made by the people with respect to internal government structure.

Decisions were obviously made by the voters in New York, directly through approval of the State Constitution and indirectly through statutory implementation, that although there should be voter participation in effecting changes in the established and traditional structure of county government, that participation should be on a basis other than simple majority. The people of the state made the political decision that in order to insure that such changes would come about in a deliberate fashion, with due recognition of the varying interests and attitudes of urban and nonurban citizens, that a complementary majority vote would be required. The state could as well—without impinging upon the constitutional rights of any of its citizens—have decided that such changes could only be made by the governor, or by some appointed commission, or in some other fashion in no way involving direct voter participation, and no citizen could successfully raise a judicial constitutional challenge. There would be no denial of Equal Protection under the Fourteenth Amendment as to the *method* selected by the state to determine when and what changes, if any, should be made in the existing structure of county government. In short, provided that the result is a

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[2] It is significant that appellees are unable to answer appellant's analysis of the import of the *Gomillion* decision, attempting to avoid the conclusions of that analysis with the faint and unsupported assertion that the analysis "is ingenious but is all semantics" (Page 17, brief of appellees CALL and Shedd).

Republican form of government, there would be no "federally protected right" transgressed.

But appellees argue, and the District Court held, that if a state allows any direct voter participation in the decision-making process as to changes in the structure of subsidiary governmental subdivisions—a matter within the exclusive sovereign domain of the states—there is thus immediately created a previously nonexistent constitutional right to require that any and all voter participation be on the basis of one person, one vote—or not at all. The illogic of such reasoning is apparent, and is not supported by the decisions of this Court.

The judgment below should be reversed.[3]

Respectfully submitted,

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November 1976.

[3] Annexed as an Appendix are brief comments on various assertions made in appellees' briefs which require amplification or correction.

APPENDIX: OBSERVATIONS ON SELECTED STATEMENTS IN THE BRIEFS OF APPELLEES

The Brief of Appellees Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd

Page 5:

A. *Appellees' Statement:* "The population of the cities of Niagara County as a unit is 147,026. The population of the area outside the cities is 88,694 (A. 34). In the 1972 referendum, a total of 55,353 votes were cast. 11,594 negative notes were cast in the towns of Niagara County, 20.93% of the total vote, which minority vote prevented the adoption of the Charter (A. 12)."

Observations: 48% (47.8%) of the total of all votes cast on the charter referendum opposed its adoption.

B. *Appellees' Statement:* "On May 1, 1973, the plaintiff-appellee Shedd requested the Niagara County Legislature, in session, to appeal the dismissal of that action, to preserve it, to give him an opportunity to intervene or commence a separate action as a voter and on behalf of all other voters throughout the County who voted in favor of the Charter. The Niagara County Legislature refused the request of Mr. Shedd (A. 183-185)."

Observations: Despite the refusal of the Niagara County Legislature to prosecute an appeal from the judgment of the District Court dismissing the complaint in *County of Niagara v. State of New York*, appellee Shedd made no effort to obtain intervention in the case for the purpose of preserving appeal rights and prosecuting an appeal. The Niagara County ap-

pellees, Graf and Comerford, make the following concession in their brief at page 10: "These appellees concede that there was an identical issue in the prior action as in the action presently before the court."

Page 6:

A. *Appellees' Statement:* "In 1974, 36,808 votes were cast in the referendum, 8,222 negative notes were cast in the area outside of the cities of Niagara County, 22.33% of the total vote, which minority vote prevented adoption of the Charter.

Observations: In the 1974 charter referendum, 48% (47.4%) of the total of all votes cast opposed its adoption.

B. *Appellees' Statement:* "The Secretary of State of the State of New York certified the 1972 Charter as the form of local government for Niagara County. This action the District Court had enjoined. On February 28, 1975, the Secretary of State also certified the 1974 Charter as an independent act (Record-¶ 28, app. petition in State Court proceeding)."

Observations: Apparently, without authorization from the District Court, and contrary to the explicit provisions of the January 9, 1975 judgment, the New York State officials certified both the 1972 and 1974 charters on the same day, February 28, 1975, one day after the District Court granted an order to show cause for intervention of the Town of Lockport and Floyd Snyder (See Appendix 4, pages 43 and 44 of appellants' brief on the issue of mootness).

Page 7:

A. *Appellees' Statement:* "The County Attorney contended the judgment of January 9, 1975 had become moot."

Observations: *Appellants* contended that the January 9, 1975 judgment had become moot (appellants' May 22, 1975 motion to vacate judgment; Appendix 5, pages 45-53, to appellants' brief on the issue of mootness). The Niagara County appellees subsequently conceded that their actions and the actions of the New York State officials had rendered the judgment of January 9, 1975 moot.

B. *Appellee's Statement*: "In its statement of facts, the appellant is inaccurate as to certain facts which, we believe, should be corrected. In the case of the settlement of the January 9, 1975 judgment which implemented the 1972 Charter, when the plaintiffs-appellees moved to settle that judgment, the Niagara County attorney requested in a letter to the District Court a stipulation that the judgment apply to the 1974 Charter (Record and Appendix A-P. 10 of motion to affirm, plaintiffs-appellees, April 1976)."

Observations: In connection with the settlement of the judgment which was entered on January 9, 1975, the Niagara County appellees requested the District Court to take "judicial notice" of the 1974 charter referendum and to amend the judgment of the Court "to include the 1974 charter, allowing the State Attorney General's office to appeal from the 1972 charter passage and the 1974 charter passage." Reference was made to the "possibility" of proceeding by way of stipulation (See December 10, 1974 letter of County of

Niagara Attorney to Judge Curtin; Appendix 1, pages 27-8, to appellants' brief on the issue of mootness). The District Court refused to proceed in the fashion requested (See January 9, 1975 judgment, A. 145).

Pages 7 and 8:

Appellees' Statement: "On return of the motion to settle the judgment, the plaintiffs-appellees, in open Court, agreed to stipulate, but the Attorney-General of the State of New York refused to enter into a stipulation and there being no motion before the Court on the subject or an appropriate application, the Court made no determination of such issue and granted the judgment prepared by the plaintiffs-appellees."

Observations: There is no support in the record for these assertions.

Page 8:

Appellees' Statement: "The appellant is also inaccurate that the plaintiffs-appellees concurred that the 1974 Charter should be implemented, rather than the 1972 Charter, without authorization of the District Court.

"At all times, the plaintiffs-appellees urged the District Court and the County officials of Niagara County that the judgment of the District Court must be specifically complied with."

Observations: On May 20, 1975, counsel for appellees Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd wrote the District Court, stating in part:

"This letter is intended to state the position of the plaintiffs in the above action concerning the application of the intervenor-defendants for a stay of the election of a Niagara County Executive and Niagara County Controller in the 1975 general election.

* * *

"The plaintiffs do not object to the action of the New York Secretary of State and the County of Niagara to implement the 1974 Niagara County Charter. The decision is a voluntary implementation of the declaration of the right of suffrage of the voters of Niagara County by this Court and is consistent with it."

Page 10:

Appellees' Statement: "It [the New York State procedure] is the dual box voting procedure rejected in *Hill v. Stone* 421 U.S. 289, 95 S. Ct. 1637 (1975)."

Observations: The New York State procedure under attack in this case is *not* "a dual box voting procedure." The *Hill v. Stone* procedure was a specially designed attempt to obtain a final elective decision in the face of a then-pending constitutional challenge to a "property rendering" condition to voting. The effect of the dual box procedure was that the nonrenderers could help defeat a bond issue, but they could not help pass it. That is not the case at bar since all voters could help both to pass or to defeat a proposed change in the structure of county government. It is misleading to characterize the New York complementary majority procedure as a "dual box" procedure similar to that reviewed in *Hill v. Stone, supra.*

The Brief of Appellees Graf and Comerford

Page 14:

A. *Appellees' Statement:* "A new referendum on the charter proper would result in almost complete chaos in Niagara County government and impair the validity of official acts since January 1, 1976. It would also produce years of litigation and a multiplicity of lawsuits. This could not be an equitable result nor an economically provident one."

Observations: These dire predictions are not supported by anything in the record. The allegations of "chaos," "years of litigation" and a "multiplicity of lawsuits" are extra-record, nonfactual speculations. As past experience in similar matters has documented, the transition back to the preexisting legislative form of county government can be accomplished in a sensible fashion under the supervision of the District Court.

B. *Appellees' Statement:* "In the general elections of November, 1975, political power was taken from one major party and given to another by the will of the voters. Naturally, the losers want to change this result, if possible, by destroying the 1974 charter. They want to change the result of the recent elections, after they have been held."

Observations: This inappropriate, extra-record assertion is obviously designed to create the false impression that this appeal is politically motivated by the "losers" in the November 1975 elections under the charter. This is, of course, not the case. The intervening appellants are the Town of Lockport and its Supervisor, Floyd Snyder, neither having been involved as candidates in the November 1975 elections. In-

tervention was obtained and this appeal processed many months before the November 1975 elections were held and the results known.

Page 20:

A. *Appellees' Statement:* "Also, if census statistics are resorted to, there is an unlimited potential for discrimination of blacks within the cities of the County of Niagara. This is a consideration worth noting and for requiring a strong state interest if defendant-appellants are to justify a dual referendum requirement."

Observations: There is nothing in the record to support these assertions. It is unfortunate that appellees seek to import racial considerations into this case on brief to this Court without any record support, and contrary to fact. The Court will note that in 53 counties of the state out of the total 57 listed in Exhibit B to the complaint (A. 33-5), the total population in towns *exceeds* the total population in cities within the county.

B. *Appellees' Statement:* "First, the dual majority requirement of the instant case does not provide, as defendants-appellants suggest, for a simple majority vote."

Observations: Appellants have made no such suggestion.